

UNITED STATES OF AMERICA,                    )  
  )  
v.   )   No. 5:08-CR-262-1-D  
  )  
FERNANDO MIGUEL NUNEZ,                    )  
  )  
                    Defendant.                )

AT RALEIGH: MONDAY, OCTOBER 6, 2008

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A P P E A R A N C E S

ON BEHALF OF THE Government:

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ON BEHALF OF THE DEFENDANT:

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1	<u>P R O C E E D I N G S</u>	11:39 a.m.
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(This cause came on for hearing before Honorable  
James C. Dever III, United States District Court  
Judge, at Raleigh, North Carolina, Monday, October  
6, 2008 at 11:39 a.m.)

6                   The Court:           Ms. Jackson, is the Government ready  
7 to proceed?

8 Ms. Jackson: Yes, we are, Your Honor. Thank you.

9                   The Court:           Mr. Ashton, are you and Mr. Nunez  
10 ready to proceed?

11 Mr. Ashton: Just one moment, Your Honor. We're  
12 looking at the waiver of indictment.

13 The Court: Okay.

14 | (Pause.)

15 Mr. Ashton: We're ready to proceed, Your Honor.

16                   The Court:           At this time I'd like to have Mr.  
17 Nunez sworn or have him affirmed.

18 (Whereupon,

19 | FERNANDO MIGUEL NUNEZ

20 was called as a witness, duly sworn, and testified as  
21 follows:)

22	E X A M I N A T I O N	11:41 a.m.
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23	By The Court:
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24 Q Mr. Nunez, do you understand that having been  
25 sworn, your answers to my questions are subject to the

1 penalty of perjury?

2 A Yes, Your Honor.

3 Q Please tell me your full name.

4 A Fernando Miguel Nunez.

5 Q And how old are you, sir?

6 A I'm 25.

7 Q How far did you go in school?

8 A Tenth grade, Your Honor.

9 Q And you are able to speak and understand English;  
10 correct?

11 A Yes, Your Honor.

12 Q And did you hear me this morning when I described  
13 all of the rights you have under the constitution and laws of  
14 the United States?

15 A Yes, Your Honor.

16 Q And did you hear all those other questions I asked  
17 the defendants as a group?

18 A Yes, Your Honor.

19 The Court: All right. Mr. Ashton, do you have  
20 any reason to doubt Mr. Nunez' competence to go forward here  
21 today?

22 Mr. Ashton: No, Your Honor.

23 The Court: Ms. Jackson, do you have any reason  
24 to doubt Mr. Nunez' competence to go forward today?

25 Ms. Jackson: No, Your Honor.

1           The Court:       All right. Let the record reflect  
2 that based upon the Court's observations of Mr. Nunez, Mr.  
3 Nunez' answers to the Court's questions, and the answers of  
4 counsel, the Court finds that Mr. Nunez is competent to go  
5 forward here today.

6           By The Court:

7           Q       Mr. Nunez, it is the Court's understanding that  
8 you've come here today intending to enter a plea of guilty to  
9 a criminal information to be filed by the United States  
10 Attorney's Office; is that correct?

11          A       Yes, Your Honor.

12          Q       I'm going to inform you of the nature of the  
13 charges against you and advise you of the maximum penalty  
14 that applies to each charge. After you are so informed,  
15 you'll be asked how do you plead, either guilty or not guilty  
16 to the charge.

17                If you plead guilty to a charge, I'll ask you a few  
18 more questions to be sure that a guilty plea truly derives  
19 from your own free will, has a factual basis, and to  
20 determine if the Court in its discretion should accept your  
21 plea of guilty.

22                You are charged in a criminal information filed by  
23 the United States Attorney. The charge is that on or about  
24 August 14th, 2007 in the Eastern District of North Carolina  
25 you did knowingly and intentionally possess with the intent

1 to distribute more than 100 kilograms of marijuana, a  
2 Schedule I controlled substance, in violation of 21 U.S.C.  
3 Section 841(a)(1). Do you understand the charges against  
4 you, sir?

5 A Yes, Your Honor.

6 Q All right. With respect to the penalties of that  
7 offense, the Court advises you as follows: the maximum term  
8 of imprisonment is 40 years. The minimum term of imprison-  
9 ment is five years. The maximum term of supervised release  
10 is five years. The minimum term of supervised release is  
11 four years.

12 The maximum fine is \$2 million. You may be ordered  
13 to pay restitution. You will be ordered to pay a special  
14 assessment of \$100. Do you understand all the maximum--  
15 excuse me. Do you understand the cost of the penalties  
16 associated with this offense?

17 A I do, Your Honor.

18 Q Do you understand all the possible consequences of  
19 pleading guilty that we've talked about here today?

20 A Yes, Your Honor.

21 Q Do you understand you have to waive or give up all  
22 the trial related rights that I've talked about before you  
23 can plead guilty?

24 A Yes, Your Honor.

25 Q All right. Have you discussed with your lawyer the

1 charge in the criminal information to which you intend to  
2 plead guilty?

3 A Yes, Your Honor.

4 Q Do you understand that if you were to go to trial  
5 on that charge, the Government would have to prove through  
6 competent evidence and beyond a reasonable doubt what it says  
7 in that criminal information? Do you understand that?

8 A Yes, Your Honor.

9 Q Have you discussed with your lawyer the now  
10 advisory sentencing guidelines and the sentencing factors  
11 under Section 3553(a) and how they may impact your sentence?

12 A Yes, Your Honor.

13 Q Do you understand that your attorney's estimate of  
14 the advisory guideline range is simply his best estimate,  
15 that it's up to the Court to determine the advisory guideline  
16 range?

17 A Yes, Your Honor.

18 Q Do you also understand that even if your lawyer has  
19 given you an estimate of a range of what your sentence might  
20 be, it's up to the Court to determine what your sentence  
21 actually will be? Do you understand that?

22 A Yes, Your Honor.

23 Q You've entered into a written plea agreement;  
24 correct?

25 A Yes, Your Honor.

1           Q     Now, in connection with your case, has anyone  
2 threatened you or anyone else or coerced you in any way to  
3 plead guilty?

4           A     No, Your Honor.

5           Q     All right. With respect to the plea agreement, I  
6 need you to look at the very last page of that agreement--I  
7 think it's page 9--and tell me whether you signed that  
8 agreement, sir.

9                     (Witness peruses document.)

10          A     Yes, Your Honor.

11          Q     Did you read and discuss this entire plea agreement  
12 with your lawyer before you signed it?

13          A     Yes, Your Honor.

14          Q     Does this written plea agreement constitute in its  
15 entirety the whole agreement you have with the Government  
16 about resolving your case?

17          A     Yes, Your Honor.

18          Q     Do you understand each term in the plea agreement?

19          A     Yes, Your Honor.

20          Q     We need to go over one term in particular. It's  
21 paragraph 2(c). You agree to the following:

22                     "to waive knowingly and expressly the right to  
23 appeal whatever sentence is imposed on any ground,  
24 including any appeal pursuant to 18 U.S.C. Section  
25 3742, reserving only the right to appeal from a



1 sentence in excess of the advisory guideline range  
2 that is established at sentencing.

3 You further waive all rights to contest the  
4 conviction or sentence in any postconviction  
5 proceeding, including one pursuant to 28 U.S.C.  
6 Section 2255, excepting the defendant's right to  
7 appeal based upon grounds of ineffective assistance  
8 of counsel or prosecutorial misconduct not known to  
9 the defendant at the time of defendant's guilty  
10 plea. The foregoing appeal waiver does not  
11 constitute or trigger a waiver by the Government of  
12 any of its rights to appeal provided by law."

13 Do you understand the appellate rights you're  
14 giving up in that paragraph?

15 A Yes, Your Honor.

16 Q Has anyone made any promise to you that's made you  
17 decide to plead guilty?

18 A No, Your Honor.

19 Q With respect to sentencing, do you understand that  
20 if you enter a plea of guilty as charged, the Court could  
21 impose the maximum penalty authorized by law as your  
22 sentence?

23 A I do, Your Honor.

24 Q Do you understand that if the Court were to impose  
25 such a maximum penalty sentence, you are not going to be

1 allowed to withdraw your plea of guilty?

2 A I do, Your Honor.

3 Q Has anyone made any promise to you as to what your  
4 sentence would be?

5 A No, Your Honor.

6 Q All right. And you understand this is a felony  
7 offense?

8 A Yes, Your Honor.

9 Q You understand the maximum penalty authorized by  
10 law for this offense?

11 A Yes, Your Honor.

12 Q You understand that by pleading guilty to this  
13 felony offense you may be deprived of certain valuable civil  
14 rights, such as the right to vote?

15 A I do, Your Honor.

16 Q Do you understand your right to have a grand jury  
17 consider your case, and are you prepared to waive that right  
18 here in open court?

19 A Yes, Your Honor.

20 The Court: All right. Mr. Ashton has a form  
21 for you to review and sign and hand up.

22 Mr. Ashton: We've reviewed it and he has signed  
23 it. May I approach?

24 The Court: You may approach.

25 (Document handed up to bench.)

1           The Court:       All right. The Court has reviewed  
2 the waiver of indictment form that Mr. Nunez has signed here  
3 in open court and finds it to be order.

4           By The Court:

5           Q     Mr. Nunez, do you understand that right now, at  
6 this very moment, you still have the right to plead not  
7 guilty?

8           A     I do, Your Honor.

9           Q     Do you understand if you were to plead not guilty,  
10 you would be afforded all of those trial related rights that  
11 we've talked about here today?

12          A     Yes, Your Honor.

13          Q     Do you also understand, sir, that if you plead  
14 guilty here in a moment and the Court accepts that plea, then  
15 there will not be a trial?

16          A     Yes, Your Honor.

17          Q     Instead you have waived or given up all those trial  
18 related rights that we've talked about. Do you understand  
19 that?

20          A     I do, Your Honor.

21          Q     Mr. Nunez, have you answered all of my questions  
22 truthfully today?

23          A     Yes, Your Honor.

24          Q     All right. I'm going to ask you how you plead now,  
25 and the charge is as follows: that on or about August 14th,

1 2007 in the Eastern District of North Carolina you did  
2 knowingly and intentionally possess with the intent to  
3 distribute more than 100 kilograms of marijuana, a Schedule I  
4 controlled substance, in violation of federal 21 U.S. Code  
5 Section 841(a)(1). How do you now plead to that charge, sir,  
6 guilty or not guilty?

7 A Guilty as charged, Your Honor.

8 Q Did you do what's charged in the information, sir?

9 A Yes, Your Honor.

10 Q Then you are in fact guilty as charged of that  
11 offense, sir?

12 A Yes, Your Honor.

13 The Court: Thank you, Mr. Nunez. You may have  
14 a seat. At this time, Ms. Jackson, if you could make a  
15 proffer as to what the evidence would show so the Court may  
16 determine whether there is in fact a factual basis for the  
17 plea.

18 Ms. Jackson: Thank you, Your Honor. On August  
19 the 14th of 2007, Officer Chad Coffee, who is with the  
20 Granville County Sheriff's Department, was on routine patrol.  
21 He was working the area of U.S. Highway 15 in Creedmoor,  
22 North Carolina.

23 He encountered a vehicle that had been speeding, so  
24 he went ahead and stopped it. The driver of the vehicle was  
25 a person by the name of Phillip Morgan. One of the

1 passengers in the vehicle was the defendant. The driver  
2 appeared overly nervous, and so the officer went ahead and  
3 asked the driver if he could search the vehicle.

4           The evidence would show that once he searched the  
5 vehicle, the officer found nine cardboard boxes containing  
6 approximately 901 pounds of marijuana. The evidence would  
7 show that the marijuana load was picked up in Laredo, Texas.  
8 The marijuana was on its way to a guy by the name of David  
9 Jones in Oxford, North Carolina.

10           The defendant, Mr. Nunez, had traveled from  
11 California to make sure that the deal went through. The  
12 evidence would show again, Your Honor, that the marijuana was  
13 in fact marijuana, and that it was in excess of 100 kilograms  
14 and was possessed with the intent to distribute it.

15           The Court:       And you said he was a passenger in  
16 the car?

17           Ms. Jackson:   Yes, Your Honor. The defendant was  
18 in the car and there was another passenger, and again, the  
19 driver, who consented to the search. Again, they were  
20 transporting this load to another person who was waiting for  
21 the load in Oxford, North Carolina. The load, again, was  
22 picked up in Texas.

23           And the defendant's--part of his role in this was  
24 to make sure that the deal went through. The evidence would  
25 show that he had traveled from California to make sure that

1 that happened.

2 The Court: Okay.

3 Ms. Jackson: Thank you.

4 The Court: All right. Mr. Nunez, based on the  
5 Government's summary and your acknowledgement that you are in  
6 fact guilty as charged in the criminal information, and  
7 because you know your right to a trial and what the maximum  
8 possible punishment is, and because you voluntarily pleaded  
9 guilty, the Court will accept your plea of guilty to the  
10 charge contained in the information.

11 Let the record reflect that the Court is satisfied  
12 that the plea was freely and voluntarily entered. At the  
13 time it was entered the defendant was fully competent and had  
14 a full and complete understanding of the nature of the  
15 charges against him and the maximum penalties provided by  
16 law.

17 The plea is supported by an independent basis in  
18 fact containing each essential element of the offense. The  
19 defendant's plea is accepted and he is adjudged guilty of the  
20 charge contained in the criminal information.

21 The matter is set for sentencing here in the  
22 January 26 term of court. Immediately following the hearing  
23 your lawyer will contact the probation officer present in the  
24 courtroom to arrange for your interview, hopefully sometime  
25 today, but certainly within three business days.

1           That interview relates to preparing the presentence  
2 report. You will get a copy of that report when it's  
3 prepared. So will your lawyer. So will the Government's  
4 lawyer. If you believe that anything in that report is  
5 incorrect, you need to timely object to it. The Government  
6 also gets a chance to object. The Court will resolve any  
7 objections at the time of the sentencing hearing. The Court  
8 will then determine what the advisory guideline range is.

9           The Court will hear from Mr. Ashton, your lawyer,  
10 on your behalf. You'll have an opportunity to make a  
11 statement. Then the Court will hear from the Assistant  
12 United States Attorney handling your case. After hearing  
13 from all those folks, the Court will determine what your  
14 sentence is and announce it right here in open court. That  
15 will be the process that we'll follow in connection with your  
16 case.

17           Today you'll be remanded to the custody of the  
18 United States Marshal. You will continue to have access to  
19 consult with Mr. Ashton as you prepare for sentencing in your  
20 case. Ms. Jackson, is there anything else we need to take up  
21 today in connection with Mr. Nunez?

22           Ms. Jackson: Your Honor, I just want to make sure  
23 it's clear that in the original documents that were filed,  
24 the Government had filed the defendant under the name of  
25 Fernando Michael Nunez, and his name is Miguel.

1           So I believe that we filed a criminal information,  
2 and then we changed the first page of the plea agreement, and  
3 the defendant did sign his name correctly. But his middle  
4 name is Miguel, not Michael, and I just want to make sure  
5 that all the paperwork is clear in that regard.

6           The Court:       Okay. Mr. Ashton, do you agree with  
7 that?

8           Mr. Ashton:     Yes. We brought that to the U.S.  
9 Attorney's attention, and we appreciate them complying.

10          The Court:       Okay.

11          Ms. Jackson:    Thank you, Your Honor.

12          The Court:       The Court does note that the  
13 information that has been filed and the memorandum of the  
14 prehearing, which reflect that the defendant's name is  
15 Fernando Miguel Nunez, is both in those documents that have  
16 been filed, and in documents henceforth his correct name will  
17 be used. Is there anything else in connection with Mr.  
18 Nunez' case today, Mr. Ashton?

19          Mr. Ashton:     One possible thing is--it's a  
20 procedural matter. He's actually not had a detention  
21 hearing, I don't believe, because he was in state custody for  
22 about a year.

23          The Court:       Okay.

24          Mr. Ashton:     And we're proceeding by information  
25 instead of the indictment.



1                   The Court:       Okay.

2                   Mr. Ashton:     And there is a report that was  
3 generated by---

4                   The Court:     (interposing) Right.

5                   Mr. Ashton:     ---the detention office.

6                   The Court:     Do you want to be heard on the issue  
7 of custody?

8                   Mr. Ashton:     The only change is he does have an  
9 address in Durham that he did not have when he met with the  
10 probation officer a couple weeks ago for a possible  
11 residence. But I've discussed it with him, and I do not  
12 anticipate the report would change the recommendation of the  
13 probation officer regarding being detained. We would not  
14 pursue that at this time.

15                  The Court:     Okay. Does the Government want to  
16 be heard on the issue of detention?

17                  Ms. Jackson:   Yes. We would just contend that  
18 he's a risk of flight and a danger to the community for the  
19 reasons set forth in the report, including the fact that he  
20 has two violent prior criminal convictions under enforcement  
21 presumption in this case, And that now that he's pled guilty  
22 to this mandatory minimum sentence, we would ask that he be  
23 detained in the Fed for all the other reasons that are set  
24 forth in the report.

25                  The Court:     Well, the Court, having fully

1 considered the matter under 18 U.S.C. Section 3143, including  
2 considering the materials in the report, does find that Mr.  
3 Nunez is both a risk of flight and a danger to the community.  
4 The report will be amended to reflect the address in Durham,  
5 and I'm sure that will be in the presentence report as well,  
6 the address in Durham.

7 But again, having considered the matter, Mr. Nunez  
8 will be remanded to the custody of the United States Marshal.  
9 He will continue to have access to consult Mr. Ashton as you  
10 prepare for sentencing in your case. Mr. Ashton, is there  
11 anything else?

12 Mr. Ashton: No, sir. Thank you.

13 The Court: Anything else from the Government?

14 Ms. Jackson: No. Thank you, Your Honor.

15 The Court: Thank you, Ms. Jackson. Thank you,  
16 Mr. Ashton. That will conclude the matter involving Mr.  
17 Nunez this morning. The court will be in recess until 9:00  
18 a.m. tomorrow.

19 (The hearing was closed at 11:53 a.m.)

C E R T I F I C A T E

I, Alexandra Hartman, Notary Public-Reporter, do hereby certify that the foregoing proceedings were taken by me and transcribed by me and that the foregoing pages 3 through 18 constitute a true and correct transcript of the proceedings to the best of my ability.

In witness whereof, I have hereunto set my hand, this 19th day of August, 2009.

\_\_\_\_\_/s/ Alexandra Hartman

Alexandra Hartman, CVR